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IN THE

Supreme Court of the United States

..... Term, 1965

No. 278 1

UNITED STATES OF AMERICA,

vs.

CHESTER WILLIAM STUPAK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Chester William Stupak, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above cause on May 25, 1965, affirming the judgment of conviction and sentence of the United States District Court for the Western District of Pennsylvania following trial of petitioner for wilful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers.

Opinions in the Courts Below

The Opinion, *per curiam*, of the Court of Appeals is reported at ____ F. 2d ____ and is reproduced in the Appendix at page 12.

The Opinion of the District Court was not published and is reproduced in the Appendix of appellant filed in the court below at page 178a.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated May 25, 1965. This court has jurisdiction to review the judgment under 28 U. S. C. § 1254(1).

Questions Presented

1. In a prosecution for wilful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers, where the government charged and offered proof that petitioner was the partner of another in the operation of a numbers lottery and under such circumstances payment of only one special tax was required, did not the government's burden of proof that the tax was due include the duty to prove that the tax had not been paid by the partner it claimed petitioner had, and if such was the government's burden was the petitioner denied due process of law and a fair trial by the holding of the District Court, affirmed in the Court of Appeals, to the effect that the matter was one of defense and which in effect required petitioner to prove his innocence?

2. Where the principal evidence of guilt consisted of admissions allegedly made by petitioner and his partner as testified to by the chief government witness, a local police detective, who claimed petitioner and the alleged partner paid him bribes, which he had not kept, to protect their numbers business and petitioner claimed that the witness has testified falsely to conceal the fact that he had failed to disclose to his superiors the true reason petitioner

had paid him money or the correct amount he received, was it not error to refuse petitioner the right to develop on cross examination and by direct testimony that the witness had made large and lavish personal expenditures which his apparent financial condition would not have enabled him to make?

3. Where two of the jurors admitted having read during the trial newspaper articles in which it was stated, among other things, that petitioner's alleged partner had earlier been convicted on gambling charges, and in which petitioner was described as a numbers "baron" and "writer", and the court refused to interrogate the jurors separately concerning the influence on them of the prejudicial article in question, was not the refusal of the courts below to order a new trial erroneous and contrary to fairness and to decisions of this court?

Constitutional and Statutory Provisions Involved

Amendment V to the Constitution of the United States of America provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

26 U. S. C. § 4411 provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

26 U. S. C. § 4401(c) provides:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *"

26 U. S. C. § 4413 provides:

> "Sections 4901, 4902, 4904, 4905 and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provisions of sections 4901 to 4907, inclusive, shall so extend or apply."

26 U. S. C. § 4902 provides:

> "Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax."

26 U. S. C. § 4903 provides:

> "The payment of the special tax imposed, other than the tax imposed by section 4411, shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the register kept in the office of the official in charge of the internal revenue district. * * *"

Statement

Jurisdiction arose in the District Court as a result of the filing against petitioner of a federal information alleging his wilful failure to pay the special tax imposed by 26 U. S. C. § 4411 on persons engaged in the business of accepting wagers.

1.

The information charged that petitioner and one Henry Katz, an "associate" but not a defendant, were engaged, between September 1, 1957 and March 1, 1958, in the operation of a numbers lottery in Pittsburgh, Pennsylvania, having a proprietary interest therein, and that petitioner was engaged in the business of accepting wagers and was

required, but wilfully failed, to pay the special tax (5a).* To prove the charge, the government relied principally upon the testimony of a single witness, John James. James was a police detective employed by the City of Pittsburgh. His testimony was to the effect that in August or September, 1956, he had been placed on a special assignment which enabled him over the next eighteen months to accept a series of bribe payments from each of numerous persons engaged in illegal activities, who were under the impression that such payments would guarantee them against police interference (48a, 109a, 127a, 152a). James claimed that, while acting pursuant to his special instructions, he met the petitioner and Katz in a Pittsburgh nightclub on February 6, 1957, at which time petitioner and Katz disclosed to him their joint interest as equal partners in a numbers business (40a, 95a, 119a, 161a), identified certain writers and locations as being theirs (47a) and proposed to pay James $300 a month for protection. The admissions of both Katz and petitioner, as reported by James, were employed against petitioner. James further testified that he had on that occasion and subsequently received from petitioner payments amounting to $1,350.00 (51a-58a), all of which he claimed he turned in to his superiors with a full and truthful report on his activities. The foregoing was bolstered by government evidence that certain of the persons allegedly named by Stupak and Katz to James as being their writers had been arrested in numbers raids during the information period. The government further introduced testimony that Stupak knew the tax requirement (14a) and also called a witness from the Internal Revenue Service to prove that Stubak had not paid the tax (10a). While the government had proved in its own

* References are to the appendix for appellant filed in the court below.

case that Katz and Stupak were partners, a contention that Stupak disputed, there was no evidence introduced by the government to show whether or not the tax had been paid by Katz.

After the government rested, the provisions of section 4902 were called to the attention of the court. The government then requested, but was refused permission to reopen to prove whether the tax had been paid by Katz or not. Subsequently, following conviction, petitioner's motion for judgment of acquittal or for a new trial on the basis of the failure of the government to prove that a tax was due was denied. In its opinion (at 180a), the District Court rejected petitioner's contention that the government was required but had failed to prove that the single tax owed by the partnership had not been paid by Katz. The Circuit Court, without discussing the matter, affirmed.

2.

Petitioner did not himself testify. The defendant introduced evidence in line with its theory that petitioner had been engaged in playing dice but was not in the numbers business. From some time around February, 1957 (Transcript 415), the date of James' first contact with petitioner, it was shown that he had commenced to operate a dice game on the South Side of the City and did so without police interference throughout the year (Transcript 416). It was the petitioner's position, as indicated by the cross examination of James (157a-158a), that the latter had been paid by him for permitting or protecting the dice game and that James had kept these sums but reported to his superiors that the money actually paid by Katz for the protection of Katz's numbers business was paid by both Katz and petitioner.

Petitioner attempted to show by cross examination of James and also through offers to produce evidence that during the period involved James had spent large sums in cash for such things as furniture, a trip to Florida, education expenses for his daughter, a Cadillac ($2762), a station wagon ($2300), down payment on a home ($5000) and a piece of machinery ($2500). Petitioner offered to show, also, that James' salary as a police officer was $5,000 per year and that he had had no profits or had a loss in a florist business in which he had an interest. The offers are at 101a-106a, 107a, 145a, 164a-169a. The rulings sustaining the government's objections are at 108a, 148a, 151a, 165a, 168a. Petitioner was prevented from asking even what the witness' salary was (151a).

The purpose of the cross examination and offers was to show that James had testified untruthfully against petitioner and had a reason and bias causing him to do so. Had reasonable latitude been allowed in the cross examination of James as to his expenditures and the source of the moneys he spent, petitioner might well have proved the sums he spent for personal acquisitions had come from those who were accustomed to pay him bribes. The government had no obligation of protect the witness against a full inquiry into his finances.

If as the defense contended, James had received money from Stupak for protection of a dice game which James had pocketed, additional money for the protection of Katz, but none at all from the petitioner for protection of a numbers business, a sufficient motive for his false testimony and bias against Stupak existed. His job, and perhaps his liberty, depended on the effectiveness with which he lied. To show he spent money he received in bribes (*i.e.*, more than he legitimately had) would obviously have

proved he received more than he said and, inferentially, for other purposes than he declared.

3.

On the second day of trial, two of the jurors admitted that they had read articles appearing in the newspapers for the evening and morning before in which lengthy reports of the trial were given and in which petitioner was characterized as a "former South Side numbers baron" and numbers writer". It had not been contended by the government that petitioner was either a numbers baron or writer, only that he had a proprietary interest in a numbers business. In one of the articles, a special section was devoted to the prior conviction of Katz under separate heading entitled "Katz Convicted, Appealing". It was revealed that "Katz was convicted last June on gambling charges" and had appealed for a new trial (172a-174a). Evidence as to the previous conviction of Henry Katz, petitioner's alleged partner, could not properly have been admitted at the trial because of its highly prejudicial and inflammatory effect.

Prior to the time counsel for petitioner requested that the jurors be interrogated concerning their reading of the newspaper articles, the jurors had not been instructed against exposure to radio, television or newspaper publicity concerning the trial. Nor was there afterwards any proper interrogation of the jurors to determine the extent of the influence on their minds the newspaper articles had, although this had been requested (64a-65a). The court merely asked the two jurors who admitted reading the articles whether they could still bring in a fair verdict and, of course, they claimed they would remain uninfluenced (67a). Petitioner's motion for a mistrial was

denied and subsequently the court denied a motion for a new trial based upon this ground. The opinion of the Court of Appeals did not specifically discuss petitioner's contention that he had been deprived of a fair trial by reason of the exposure of the jurors to the prejudicial newspaper articles.

Reasons for Granting the Writ

1. First Question Presented: Even though the government's case was replete with evidence which brought 26 U. S. C. § 4902 into play, the Circuit Court affirmed the District Court's holding that petitioner had the burden, by way of defense, to show payment of the tax by a partner whom the government claimed but petitioner denied he had. This ruling, as affirmed, appears to result in a violation of the principle that the burden of proving petitioner's guilt, *i.e.*, that the tax was due in this instance, rested on the government.

The decision of the court below involves a federal question of substance concerning not only the proper interpretation and application of 26 U. S. C. § 4902 in the enforcement of the wagering tax laws, but also the incidence of the burden of proof generally in criminal cases where a defense arises from the government proof.

The decision of the Court of Appeals in this instance also appears to be contrary to decisions of other courts of appeal and other federal courts on similar, although not identical, questions. See *Johnson v. United States,* U. S. App. D. C., 317 F. 2d, 127, 129, note 2; *Cf. United States v. Fabrizio,* D. Del., 193 F. Supp. 446, 450. So far as petitioner has been able to discover, this court has not heretofore passed upon the questions presented by the foregoing.

2. Second Question Presented: In foreclosing the right of the petitioner to develop by way of cross examination and by affirmative proof matters bearing on the financial involvement of the witness James which would have affected his credibility and tended to show his bias and motive to testify falsely, the District Court departed from, and the Court of Appeals sanctioned a departure from, the accepted and usual course of judicial procedures. In this case, the finding of guilt depended upon acceptance of the testimony of a single witness, whose opportunities to enrich himself by reason of his position were obvious. The accepted and usual course would have been to permit a wide range of cross examination to show the bias, motive or animus of this witness. *Alford v. United States,* 282 U. S. 687, 51 S. Ct. 218; *Jones v. Schanck,* U. S. App. D. C., 248 F. 2d 658, 659; *United States v. Lester,* 2 Cir., 248 F. 2d 329, 334; *United States v. Augustine,* 3 Cir., 189 F. 2d 587, at pages 590-591.

3. Third Question Presented: This court held in *Marshall v. United States,* 360 U. S. 310, 79 S. Ct. 1171, that the exposure of some of the jurors to newspaper articles containing matters highly prejudicial to the defendant required the granting of a new trial, not merely the giving of cautionary instructions. In this case, highly detrimental and inadmissible information came to the attention of at least two members of the jury and could not have but prejudiced their minds against the petitioner. No proper investigation was made to determine the effect of the articles on their minds. Under these circumstances, exercise of this court's power of supervision to review on writ of certiorari is indicated because of the failure of the court below to require observance of the procedure required by the *Marshall* case.

Conclusion

On the basis of the following, your petitioner respectfully prays that this court grant his petition for writ of certiorari.

Respectfully submitted,

JOHN E. EVANS, SR.,
PAUL E. MOSES,
Attorneys for Petitioner.

APPENDIX

Opinion of the Court

(Filed May 25, 1965)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15123

UNITED STATES OF AMERICA,

v.

CHESTER WILLIAM STUPAK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 18, 1965

Before: STALLEY, HASTIE and GANEY, *Circuit Judges.*

PER CURIAM:

On the entire record the court finds no reversible error in this conviction for willful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers. 26 U. S. C. § 4411.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.